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Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INCORPORATED, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA, APPELLEE.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia, pursuant to which the decree appealed from was entered, is reported in 10 S. E. (2nd) at page 535. It also appears at page 28 of the record. The opinion of the Corporation Court of the City of Winchester has not been officially reported, but appears in the record at page 19.

GROUNDS OF JURISDICTION

The appellant challenges the validity of section 192-b of the Tax Code of Virginia as in violation of the commerce clause, and also because of alleged deprivation of equal protection of the laws. The appeal is pursuant to section 237 of the Judicial Code, as amended.

STATEMENT OF THE CASE

Section 192-b of the Tax Code (Appendix C. Appellant's brief) imposes an annual tax of $100 upon peddlers of goods, wares and merchandise who sell to licensed dealers or retailers. There are certain exemptions, but appellant does not claim to come within any of them. It is not disputed that, if the statute is valid, appellant is liable for the tax.

In addition to the imposition of the tax, said section also contains various specific regulatory provisions with respect to peddlers which will be considered in detail later. (The Virginia Tax Code is published as an appendix to Michie's 1936 Code of Virginia.)

The facts are not in dispute. (See stipulation R. pp. 16-18.) The appellant is a West Virginia Corporation which has qualified to do business in Virginia. The only business of any kind which it does in this State consists of peddling bakery products to licensed Virginia retailers. Appellant owns no property of any kind in Virginia. It carries on its business solely from motor vans or trucks, which are domiciled at the home office in West Virginia. It's employees operate these vehicles

over regular routes and call upon the Virginia retailers, selling, and delivering to them simultaneously, the products sold. These products the appellant manufactures in West Virginia, but takes no previous orders for their sale from the Virginia retailers. The sale and delivery in Virginia constitute but a single transaction.

QUESTIONS PRESENTED

The appellant challenges the validity of the statute upon the following grounds:

1. That the business of peddling its bakery products in Virginia constitutes interstate commerce, and the State is without power, because of the commerce clause, to require a license for same or to impose a license tax.

2. That the exemption from the requirement of securing a peddler's license accorded to Virginia manufacturers who pay a tax upon their capital operates as an unlawful discriminaation against appellant and appellant's products, and as a denial of equal protection of the laws ,and constitutes as well a violation of the commerce clause.

3. That the exemption from the statute of vendors of motor vehicle fuels and petroleum products, tobacco and sea food, and of producers or growers of the agricultural products they sell, works a discrimination against appellant's bakery products, and, therefore, deprives it of such equal protection.

The appellee contends:

(a) That the business of peddling bakery products

engaged in by appellant (which is the only business it does in Virginia) is not interstate commerce but is purely local in character, and is subject to the regulation and taxation provided for by the challenged statute.

(b) That the exemption of Virginia manufacturers who pay a tax upon their capital does not discriminate against appellant because:

(1) Under Virginia's tax structure the payment of the capital tax constitutes payment for the incidental privilege of selling the goods manufactured; and,

(2) Such a manufacturer, having a permanent fixed place where or from which he conducts his business in Virginia, there is no necessity for subjecting him to the regulatory provisions of the statute.

In reply to appellant's contentions and in support of its own, the appellee will undertake to maintain the following propositions:

OUTLINE OF ARGUMENT

I. The business conducted by appellee in Virginia is not interstate commerce, but is purely local in character and within the taxing and regulatory police power of the State.

II. The challenged statute is a reasonable and proper exercise of the State's police power to regulate the business of itinerant peddling.

III. The challenged statute is a reasonable and proper exercise of the State's taxing power and does not unlawfully discriminate against appellant or deny it equal protection of the laws.

IV. The challenged statute does not unlawfully discriminate against appellant's goods by reason of their source or place of manufacture, or otherwise.

ARGUMENT

I.

The Business Conducted by Appellee in Virginia is Not Interstate Commerce, But is Purely Local in Character and Within the Taxing and Regulatory Police Power of the State.

Appellant's business which is taxed by Virginia is *not* interstate commerce. It is selling and delivering at the same time merchandise in Virginia, no previous orders having been taken therefor. This is peddling and it has long been settled by the decisions of this court that peddling in a State is purely *intrastate* commerce, it being immaterial that the goods are brought in from another State. *Howe Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296; *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445; *Wagner* v. *Covington,* 251 U. S. 95.

The leading case is probably *Emert* v. *Missouri,* but *Wagner* v. *Covington* is the more recent and presents a factual situation so nearly identical with the instant case that the court's special attention is directed to it. There a manufacturer of soft drinks in Ohio sent into Kentucky its trucks with its employees thereon for the purpose of selling the merchandise in Kentucky and delivering it at the same time without previous orders—in other words, peddling in Kentucky goods manufactured in Ohio and sent to Kentucky for that purpose. This court held that this was purely *intrastate* commerce in

Kentucky. It is difficult to conceive a case involving facts more similar to those in the case at bar, and the reasoning and conclusion therein obviously disposes of appellant's contention that it is engaged in interstate commerce in Virginia. This court said:

> "Of course, the transportation of plaintiff's goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. *So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not.*" (251 U. S. 103. Italics supplied.)

And so here, while the goods may move into Virginia in interstate commerce, that is not the business that is taxed. Virginia taxes the peddling only.

Appellant seeks to distinguish the case at bar from *Wagner* v. *Covington* by reason of the statement in the opinion that if goods brought into the State for sale are discriminated against because of their source then they have not become part of the general property of the State and the discrimination, in such a case, is against interstate commerce. But this contention is predicated

upon the assumption that the appellant's products have been discriminated against. Whether there has, in fact, been any such discrimination is, of course, the question upon which the whole case turns. This question will be hereinafter fully discussed in its appropriate place.

II.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Police Power to Regulate the Business of Itinerant Peddling.

Section 192-b of the Tax Code, here challenged, is not intended solely as a revenue measure. Perhaps its more important function is to regulate *itinerant peddling* to retailers. The necessity for such regulation has long been universally recognized. As said by this court in *Emert* v. *Missouri*, 156 U. S. 296, 306, "From early times in England and America there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practice their trade". The opinion refers to many old English and American statutes of this type, and quotes the following from an opinion of Baron Graham:

> "The object of the legislature, in passing the act upon which this information is founded, was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the michiefs of being undersold by itinerant persons, to their injury; and, on the other, to guard the public from the impositions practised by such

persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." (156 U. S. 307.)

The article on "Peddlers" in Ruling Case Law (Vol. 21, p. 180), after commenting on the fact that those following that occupation "have received general and very uncomplimentary notice", goes on to say that "Not the least of the difficulties of the peddler situation is that in case of breach of warranty, breach of contract, fraud, cheating, or even theft by the peddler, he is generally out of sight or beyond the reach of process when sought." (Id. pp. 182-3.) And further, "The universal method of guarding against deceptions, deceits and such probable abuses of peddling has been to require all persons who wish to engage in the trade in the state or community, as the case may be, to secure a license." (Id. p. 187.) It is common knowledge that irresponsible itinerant peddlers frequently sell stolen goods and articles smuggled into this country to avoid tariff charges.

The regulatory purpose of section 192-b is manifest from its provision that "Every vehicle used by any licensee hereunder shall have conspicuously displayed thereon the name of the person, firm or corporation using the same, with the post office address of the licensee, and the license hereby required shall be conspicuously displayed on each vehicle while used in such business."

The section further provides that any person claiming

to be exempt from the license requirement, or asserting that he is delivering goods previously sold, shall, upon request of an authorized officer, furnish evidence thereof in addition to his own statement. Failure to furnish such evidence is declared to be "sufficient ground for charging the person operating the vehicle with a violation of this act."

Statutes regulating peddling are designed to remedy the well known mischiefs above referred to which are common to the business of the *itinerant* peddler, who has no established place of business in the State. Licensed wholesale merchants and licensed distributors with such permanent establishments are not within the class sought to be regulated. In fact they have already secured a license of a different kind.

Appellant's chief complaint of discrimination is based on the fact that the statute does not apply to a manufacturer selling goods of his own manufacture who has paid a tax upon capital, the method adopted by Virginia for taxing manufacturers. Such a person or corporation, however, has an established place of business in the State, and his activities are within the cognizance and reach of the State law enforcement authorities. Unlike the *itinerant* peddler, he can be found when wanted. It is not necessary or reasonable that he should be subjected to the same regulation as the transient peddler, who is here today and gone tomorrow. The Virginia manufacturer is not an itinerant, nor is he a peddler within the meaning of the statute. Selling the goods he has made is an inherent part of his business, just as much so as the making of them.

The appellant contends that, since it is a manufacturer in West Virginia, the laws of Virginia should be so framed as to recognize it in a different class from the ordinary itinerant peddler. But any such attempted statutory classification or exemption of appellant would obviously apply equally to every operator of a vehicle who manufactures in any State in the Union. It would be an impossible task for the Virginia enforcement officers to determine the truth of an itinerant peddler's claim that he is exempt because he manufactured his goods in a distant State such as California. Furthermore, so far as Virginia is concerned, the only status the appellant occupies is that of an itinerant peddler to retailers. Virginia has no relations with it *as a manufacturer* and it is immaterial to the State whether it manufactures its products or buys them from others.

Nor is the amount of the fee or tax charged for the license an unreasonable one from a regulatory standpoint. Its obvious purpose is to discourage irresponsible people of the "fly by night" class from engaging in the business and to restrict it to those who intend to enter into it upon a reasonably large scale and with some degree of permanency. To this end the statute provides that the license is not transferrable and is not subject to proration. The annual charge of $100, as applied to appellant who is regularly engaged in the business amounts to only about thirty cents per day. In *Emert* v. *Missouri, supra,* the amount of the peddler's license tax sustained was $50. This was in 1894, at a time when a dollar had many times the purchasing power it has today. In *Wagner* v. *Covington, supra,*

the annual license tax was $150. (See report of case in 197 S. W. 807.)

Appellant complains of the exemption from the statute of vendors of motor vehicle fuels and petroleum products, tobacco and sea food, and of farmers selling produce grown by them as discriminatory against it. Exemptions of this kind are commonly found in such statutes. As stated in the Ruling Case Law article, *supra;* "The great majority of statutes affecting peddlers make exemptions in favor of persons peddling goods of special classes. The validity of such a statute depends on whether the commodity exemption is reasonable. A very common instance is the exemption of persons peddling farm products, as truck, meat and milk, which have been produced on their own land." (21 R. C. L. 199-200.)

With respect to motor vehicle fuels and petroleum products, these are not the types of goods that itinerant peddlers sell, or that retailers would buy from them. The only retailers handling such products are filling stations and garages, and they almost invariable purchase their supplies from a particular oil company. These oil companies always have permanent places of business in the State, with large tanks and much expensive equipment. There is no reason for their regulation as itinerant peddlers because they are not transients. All sales of tobacco are made in warehouses and are subject to both State and Federal regulation. *Currin* v. *Wallace,* 306 U. S. 1.

Appellant complains of the exemption granted peddlers of sea food. Virginia is a seaboard State and in

the Tidewater section the sea food industry is an important one. Sea foods are very highly perishable, however, and require prompt icing, and it is essential that there be no impediment to their immediate marketing. The character of the food is ill adapted to the itinerant peddler, and no reason exists why this regulatory statute should apply to it.

But the appellant has neither alleged nor proven any facts or state of facts which tend, in the slightest degree, to sustain its claim that the classification contained in the statute is unreasonable or arbitrary. The classification is presumed to be reasonable and the burden rests upon him who challenges it to prove the contrary.

That this omission to prove the non-existence of such facts, or states of facts, is fatal to its case, is conclusively established by this Court's decision in the case of *Pacific States Box and Basket Co.* v. *White,* 296 U. S. 176. The Oregon Department of Agriculture had promulgated a regulation prescribing certain types of containers for the marketing of strawberries and raspberries. The plaintiff box company sought an injunction from the Federal District Court against the enforcement of the regulation on the ground that it was arbitrary and unreasonable and granted a monopoly to manufacturers of other types of containers. The case was heard on a motion for a preliminary injunction and the defendants' motion to dismiss the bill. This raised directly the question of the sufficiency of the allegations of the bill to negative the existence of any state of facts which would render the legislation proper. On this question this Court, in an opinion by Mr. Justice Brandeis, said:

"Plaintiff contends that since the case was heard on motion to dismiss the bill, all allegations therein made must be accepted as true; and, among others, the charge that 'there is no necessity for the particular orders relating to strawberries or raspberries based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described * * * does not of necessity promote, protect, further or develop the horticultural interests of the State;' and that its necessary effect is 'to grant a monopoly to manufacturers of the so-called hallocks.' The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland,* 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. *When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts,* and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209. *The burden is not sustained by making allegations which are merely the general conclusions of law or fact.* See *Public Serv. Commission* v. *Great Northern Utilities Co.,* 289 U. S. 130, 136, 137. *Facts* relied upon to rebut the presumption of

> constitutionality *must be specifically set forth.* See *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440; *O'Gorman Young* v. *Hartford F. Ins. Co.,* 282 U. S. 251; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. (296 U. S. 176. Italics supplied.)

There is no evidence that the exempted vendors of these particular commodities complained of come into competition with appellant or its products, nor are any facts established from which it could be inferred that such vendors are of the character requiring regulation. The legislature is presumed to have known the facts, and it is presumed that facts exist to support the legislative classification. While the appellant's brief abounds with statements of conclusions of fact or law that it is discriminated against, the facts themselves on which these conclusions are supposed to be based have not been adduced. The presumption is, however, that the facts sustain the legislative action and, if appellant claims that the necessary facts do not exist, the burden is on it to prove such non-existence. Certainly the statute has not been shown to be an unreasonable or improper exercise of the State's regulatory powers over itinerant peddlers.

III.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Taxing Power and Does Not Unlawfully Discriminate Against Appellant or Deny It Equal Protection of the Laws.

Viewed solely from the standpoint of the State's taxing power, the statute constitutes, as to appellant, a reasonable and proper exerices of same. Appellant is engaged in local business as a peddler in Virginia the year round. Aside from the $100 annual charge on its license, its tax contribution to Virginia is insignificant. It enjoys the police protection afforded by the State in the operation of its trucks and the conduct of its business. It may invoke the aid of Virginia's courts in the collection of debts due it and in redressing wrongs suffered. It makes daily use of Virginia highways in the prosecution of its business, not even paying the cost of a State automobile license tag. It pays no State gasoline taxes for maintenance of the highways it uses. See paragraphs two and eight of the stipulation (R. 16-17). It is the well known custom of owners of a fleet of trucks to purchase their gasoline in large quantities at commercial consumer prices, which are usually less than the filling station operators pay.

Appellant no doubt purchases its gasoline at the home office in West Virginia, stores it in tanks there, and fills up its trucks every morning before their departure. The gasoline tax (five cents per gallon) would doubtless greatly exceed the thirty odd cents per day charged for the peddler's license. It is apparently appellant's desire to enjoy the protection of Virginia's laws and

enforcement officers, as well as the use of her highways, without making any substantial payment therefor. And appellant enjoyed this status unchallenged until 1938 by reason of the provision in section 192-b before that time exempting "a producer or manufacturer taxable on capital by this State." There being some doubt as to whether the term "producer" included a nonresident manufacturer not so taxable, no effort was made to enforce the statute against the appellant and for several years it escaped the payment of any substantial tax. This was true also of other peddlers who claimed to be "producers". In 1938 the statute was amended and the meaning of the word "producers" was clarified by the addition of the words "of agricultural products", as was no doubt the original legislative intention. Of this amendment appellant complains, laboring apparently under the belief that because it is a West Virginia corporation it is entitled to carry on the business of a peddler in Virginia free from any obligation to contribute itse proper share to the operation and maintenance of the Virginia Government, the laws of which protect said business. In fact, appellant seems to contend that it is entitled to preferential treatment in matters of taxation; that its nonresidence affords it some sort of immunity. That the contention is unsound was long ago established by the decisions of this court. Thus, in *Shaffer* v. *Carter,* 252 U. S. 37, 52-3, the rule was thus stated:

> "That a state, consistently with the Federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business

within its borders like its own citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Sec. 2 of Art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption."

But the appellant also contends that it is discriminated against because it is required to secure a peddler's license and pay a tax on same, while a Virginia manufacturer who pays a tax on capital is not required to pay also a peddler's license tax. This contention ignores the fact that the sale of the manufacturer's products is an essential, inherent part of the manufacturing business. If he does not sell his products, he cannot continue to manufacture. And Virginia's taxing system

has long recognized this obvious truth and taxed the business as a whole, laying a single tax on the making and selling of the goods. The tax is, in legal effect, a tax on the privilege both of manufacturing and of selling, in any manner desired (except at a separately established store), the goods manufactured.

The State is not required to levy taxes identical in form or amount upon nonresidents and residents, or upon residents when not engaged in identical occupations. The appellant is not classified for taxation as a manufacturer in Virginia, nor can the State's system of taxing manufacturers on capital be applied to one who has no capital in Virginia to tax. And the decisions of this court clearly sustain this principle. *Travellers Insurance Company* v. *Connecticut,* 185 U. S. 364, involved an apparent discrimination resulting from the imposition of a State tax on shares of stock in a corporation owned by nonresidents, while no *State* tax was imposed on such shares owned by residents. "But", said the court, "this apparent discrimination against the nonresident disappears when the system of taxation prevailing in Connecticut is considered. By that system the nonresident stockholder pays no local taxes. He simply pays a state tax,—contributes so much to the general expenses of the state. While, on the other hand, the resident stockholder pays no tax to the state, but only to the municipality in which he resides. * * *" (185 U. S. at page 367.)

In *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, 283-4, an individual assessed with a tax on income derived from activities outside the State

claimed he was deprived of equal protection because his competitor corporations were relieved from the tax on income from such outside activities. In denying the validity of the claim, this court held that whether discrimination exists is a question of fact, involving local conditions in Mississippi and neighboring States, as well as "how the statutory provisions now in question are related to others by which a permissible divergence in State policy with respect to the taxation of corporations and of individuals may be effected." This relation not being shown, "we cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made." And Mr. Justice Stone said further that "acceptance of this contention would relieve the appellant from the burden which rests on him to overcome the presumption of facts supporting constitutionality," and at page 284 of 286 U. S. it is added that:

> "The equal protection clause doese not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

And so in the case at bar, appellant has completely failed to adduce any facts showing or even tending to show any inequality in the tax burden placed on it by

section 192-b and that imposed on the manufacturer of bakery products who is taxed under section 73 of the Tax Code (Appendix A. Appellant's brief), and in addition pays other taxes. The mere fact that appellant and Virginia manufacturers are taxed in a different manner raises no presumption of inequality in the tax burden. On the contrary, the presumption is that there is no such inequality.

Indeed, for aught the record discloses, the burden upon the manufacturer taxable on capital may be heavier. We have seen that the one thing the appellant is doing in Virginia is pedding. If Virginia does not tax that business, there is nothing to tax. The stipulation discloses that appellant has no property here and does not even pay a license tax on its automobile used in its Virginia business, or a gasoline tax. The only tax it pays is the small net income tax from its Virginia business if it makes any income. So, it is repeated, *if its peddling is not taxed, it goes practically tax free,* although in active competition with Virginia business.

Now take the case of a manufacturing corporation taxable on capital in Virginia. It necessarily has property here and is taxable on its capital here. Section 73 of the Tax Code. (Appendix A of appellant's brief.) It is subject to local taxes on its real estate. It pays license taxes on its automobiles and trucks. It is subject to gasoline taxes and, of course, the State income tax. If it is a Virginia corporation, it pays not only an annual registration fee but an annual franchise tax. Section 211 of the Tax Code. In addition, of

course, the manufacturer in Virginia employs people, who in turn have homes here and pay their taxes here. From these taxes Virginia benefits, and the Legislature has said in effect that, the business having been sufficiently taxed, and products of its manufacture may *as a part of incident thereof be peddled without additional tax.*

It has long been Virginia's policy to so frame its taxing system as to avoid imposing upon a business or occupation a number of different kinds of taxes, and to make one tax, or as small a number as possible, suffice to cover the whole activity. Thus, merchandise brokers pay a graduated license tax which is declared to be "in lieu of a tax on the capital" employed (Tax Code, section 171), building and loan associations (section 172), and wholesale and retail merchants (section 188), and insurance companies (section 239) are similarly dealt with. Railway companies are taxed on rolling stock, intangible personal property, money and gross receipts in lieu of all other State taxes, and pay no income or capital taxes (Tax Code, sections 215 and 216). The same general principle is followed with respect to State taxation of pipe line transmission companies (section 216-a), express companies (section 219), and sleeping car companies (section 223). The foregoing are sufficient to illustrate the policy of the State's system of taxation to avoid a multiplicity of taxes, and at the same time to equalize the tax burden imposed on the taxpayers so far as this is possible of accomplishment.

And the policy of including within the privileges

paid for by the capital tax on the manufacturer, that of selling and delivering at the same time to retailers, was established long before the enactment in 1932 of section 192-b. Witness the following paragraphs from section 188 of the Tax Code which have been in the section in substantially the same form since 1928:

> "A manufacturer taxable on capital by the State may, except as in this section provided, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any license tax of any kind for such privilege to the State, or to any city, town or county.
>
> "A wholesale merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege to the State, unless otherwise provided by law."

Thus section 192-b of the Tax Code, in granting this privilege to wholesalers and manufacturers taxable on capital, is simply continuing this previously established policy of taxation. It is manifest, therefore, that the

challenged exemption is not directed at appellant or its goods, but that it was necessary to include it in the Act to make it conform to then existing statutes. And the principle that the validity of any particular item of a system must be tested by a consideration of the tax structure as a whole was emphasized in the recent case of *Wisconsin* v. *J. C. Penny Co.*, decided December 16, 1940, (85 L. ed. Adv. Op. 222, at page 224), where this court said:

> "As pressures for new revenues become more and more insistent, ways and means of meeting them present to a state not only the baffling task of tapping fresh sources of revenue but of doing so with due regard to a state's existing taxing system. The tax now assailed gains nourishing significance when placed in the context of the Wisconsin taxing system of which it became a part. * * *"

And this principle of looking to the State's taxing system to determine whether there has been unlawful discrimination was applied in the case at bar by the court below, when it said (Op. R. p. 34):

> "These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them."

But, in spite of this well established State policy of so classifying subjects of taxation as to avoid a

multiplicity of taxes on each subject, appellant insists that, in order to meet the constitutional requirements of equal protection, Virginia must separate the business of a manufacturer into two parts, and impose one tax on the manufacture of goods and another and separate tax on the privilege of selling the goods manufactured.

That this position of appellant is not maintainable necessarily follows from the decision of this court in the case of *Armour and Company* v. *Virginia*, 246 U. S. 1. The statute there involved was what is now section 188 of the Tax Code (above quoted from), which imposed a merchant's license tax on wholesale and retail merchants measured by the volume of business done. The section exempted from the license tax "manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them". Armour and Company, a New Jersey corporation not so taxable, contended that, since it was required to pay a *license* tax to sell the goods it manufactured outside the State while the Virginia manufacturer who paid the tax on capital was not required to pay such a *license* tax to sell its goods at the place of manufacture, it was denied the equal protection of the laws, its goods were discriminated against and interstate commerce was burdened. But this court held the distinction on which the classification was based "so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view." (246 U. S. 5.)

The necessary conclusion from this case is that the

manufacture of goods need not be segregated from the sale thereof for purposes of taxation in order to avoid discrimination, but that one tax may properly include the whole.

Appellant's brief (p. 13) argues that because every resident of Virginia owning any intangibles is taxed thereon under section 69 of the Tax Code (provided he does not pay a tax thereon classified as capital under section 73), and because intangibles may be classified as capital when used in a trade or business, therefore, every person paying a tax on intangibles is exempt from the peddler's license tax. But this argument overlooks the provision of section 192-b, which extends the exemption only to a *manufacturer selling goods "actually manufactured"* by him. Furthermore, "capital" as defined in section 73 includes inventories of stock on hand anywhere in the State, and various other items of property besides intangibles. It is only where the manufacturer pays a tax on all these items he possesses that he may sell the goods he makes without a peddler's license.

The statute in fact makes no distinction whatever between a resident of Virginia and a nonresident. A nonresident may manufacture in Virginia, pay the tax on capital employed in the State and this will confer on him the right to sell his products without a peddler's license. On the other hand, a resident of Virginia who desires to peddle to retailers goods manufactured by some one else must secure the license, and this is equally true whether the goods he peddles are manufactured in Virginia or elsewhere.

Furthermore, a nonresident who manufactures goods in another State may establish a place of business in Virginia as a wholesaler or distributor and sell the goods he makes, as well as those made by others, without securing a peddler's license.

Appellant states in its brief that a Virginia corporation engaged in manufacturing in another State would be taxed on his capital so employed, and, therefore, exempt from the peddler's license. But this statement overlooks the provisions of section 427 of the Tax Code, which exempts from taxation the capital of Virginia corporations not actually engaged in business in the State. Such a corporation, therefore, is not exempt from the peddler's license. No corporation engaged in business in Virginia, whether domestic or foreign, is taxable on the capital employed outside of Virginia.

The flat fee or tax charged for the itinerant peddler's license is the only practical way in which the business can be taxed. A tax based on the volume of sales would be impossible of enforcement. The itinerant peddler has no place of business in the State, and keeps no books therein from which the amount of the tax can be computed. Then again, unless a tax of this kind is *paid in advance* there is little chance of collection because the taxpayer does not remain in the State. And, furthermore, it is obvious that a tax based on volumes of sales would be utterly valueless as a regulatory measure because it would not exclude irresponsible and undesirable itinerants, which is its chief regulatory purpose. Unless the license were required to be "conspicuously displayed" on the vehicle as section 192-b does require,

it would be almost impossible for the enforcement officers to make a satisfactory check of persons actually engaged in peddling.

It is clear that no other method of taxing itinerant peddlers such as appellant is available to the State, that the challenged statute is a reasonable and proper exercise of the State's taxing power, and that it does not discriminate against the appellant.

IV.

The Challenged Statute Does Not Unlawfully Discriminate Against Appellant's Goods by Reason of Their Source or Place of Manufacture, or Otherwise.

As a general proposition of law, it may be conceded that a State by the use of its taxing power may not unlawfully or injuriously discriminate against products of another State. This rule rests upon the theory that, if a State may so discriminate, it may in effect erect a tariff wall at its borders and thus greatly impede the flow and sale of goods from one State to another so as to result in a substantial burden upon commerce between the States. However, the cases also hold that the question of whether such a discrimination in fact exists is a practical one and is not to be determined by artificial standards—that a particular statute must be analyzed together with other statutes in *pari materia* to ascertain whether it results in discrimination *as a matter of fact.*

Before considering the statutes here involved, there are certain principles well established by the decisions of this court to which attention should be called.

The leading case involving discrimination against

goods of another State is *Welton* v. *Missouri*, 91 U. S. 275. The statute of Missouri provided, says the court, that:

> "* * * whoever deals in the sale of goods, wares or merchandise, except books, charts, maps and stationery, *which are not the growth, produce or manufacture of the State,* by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. *No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product or manufacture of the State.*" (Italics supplied.)

This staute was held to be invalid because of the discriminating legislation against the goods *because* of their *"foreign character"* in that they were goods *"which are not the growth, produce or manufacture of this State."* The opinion goes on to say, speaking of *Brown* v. *Maryland*, 25 U. S. 12, 12 Wheat. 419:

> "Following the guarded language of the court in that case, we observe here, as was observed

there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation *by reason of its foreign character.* That power protects it, even after it has entered the State, from any burdens imposed *by reason of its foreign origin.* * * *" (Italics supplied.)

To the same effect is the case of *Guy* v. *Baltimore,* 100 U. S. 434, relied on by appellant. A number of other cases (not cited by appellant) applying the rule of *Welton* v. *Missouri, supra,* are reviewed in detail in *Emert* v. *Missouri, supra.*

Examination of *Welton* v. *Missouri, supra, Guy* v. *Baltimore, supra,* and kindred cases discloses that the discrimination in each of them is based on the *source* of the goods alone. For example, in *Welton* v. *Missouri, supra,* the statute afforded no *way by which goods manufactured in another State could be peddled in Missouri without a peddler's license.* The sole test in the statutes involved in all cases of this class is the *source* of the goods. If they were manufactured in the taxing State, they could be peddled there at will; if they were not so manufactured, they could not be peddled by anyone without a license.

Section 192-b of the Tax Code by no possible con-

struction makes the *source* of the goods the test of the application of the statute. It is entirely true that the *manufacturer* may not peddle them to retailers unless he has paid for the privilege by paying a tax on capital in Virginia or is a licensed wholesale merchant in Virginia, but alleged discrimination against the *manufacturer* raises a question under the equal protection clause, which has been discussed above, and not a question of discrimination against the *manufactured goods* under the commerce clause. The statute will be searched in vain for any reference to goods which "are not the growth, produce or manufacture" of Virginia, or to the "foreign character" of the goods, or any words of similar import.

As pointed out, the Statute in *Welton* v. *Missouri, supra, afforded no way by which merchandise manufactured in another State could be peddled in Missouri without a peddler's license.* This is not true of section 192-b. The section exempts from the license tax a "distributor of manufactured goods paying a State license tax on his purchases" and it also exempts a wholesale merchant "regularly licensed by this State." Appellant may sell or consign his goods to a distributor or to a wholesale merchant in Virginia, and thus the goods *manufactured in West Virginia may be peddled* to retailers by such distributor or merchant *without the license.* The *source* of the goods is not the test. The court judicially knows that hundreds of nationally advertised products *manufactured in other States* are sold in Virginia through wholesale dealers and distributors. These products may be, and in many cases doubtless are,

peddled to retailers by the wholesalers and distributors without the license required by the section. It so happens that appellant is dealing in bakery products, but that is a mere coincidence. The statute applies to *all classes of merchandise,* with a few named exceptions.

But in addition the section *allows appellant itself to peddle his West Virginia manufactured goods in Virginia without the license.* All that is necessary is that appellant establish a place of business in Virginia, not for the purpose of manufacture, but from which to distribute its goods manufactured in West Virginia. Section 188 of the Tax Code is the section imposing wholesale and retail merchants' licenses. It expressly provides how a manufacturer, either resident or nonresident, may secure a wholesaler's license in the following paragraphs:

> "* * * If a manufacturer desires to sell, at a definite place or store, other than the place of manufacture, to other persons for resale, or to institutional, commercial or industrial users, the goods, wares and merchandise manufactured by him, *then such manufacturer must take out a wholesale merchant's license,* though this definite place or store be located in the same county, city or town in which his place of manufacture is established. When a manufacturer establishes a place or store for the sale of his goods, other than at his place of manufacture, to other persons for resale, or to institutional, commercial or industrial users, the amount of the State license tax is to be measured not only by the amount of pur-

chases made by such manufacturer from others, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale; and he is required to report not only the amount of goods purchased by him from others and offered for sale, but also the amount of goods manufactured by him *either within or without this State* and offered for sale by him at his store or definite place in this State other than the place of manufacture. The cost of manufacture shall be taken as the purchase price of the goods, wares and merchandise in the case of a manufacturer who is also a wholesale merchant within the meaning of the law.

* * * * *

"A wholesale merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, *may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege* to the State, unless otherwise provided by law." (Italics supplied.) (Tax Code, Section 188.)

Thus appellant may establish a distributing point in

Virginia, as was done in *Armour* v. *Virginia,* 118 Va. 242, (affirmed 246 U. S. 1) pay a wholesalers' license and *peddle as an incident of his wholesale business without the challenged license his bakery products (manufactured in West Virginia) to retailers anywhere in Virginia.* It is of no significance to say that he may be subject to local licenses. This is also true with other wholesale merchants.

Further demonstrating that there is no discrimination in the section against the goods because of their source, take the case of the ordinary peddler (and appellant is simply that in Virginia) who is neither a manufacturer taxable on capital nor a wholesale merchant, but who simply purchases his merchandise for the purpose of peddling it to retailers. He is subject to the license whether the goods are the products of Virginia, West Virginia or China. The section in no respect makes the liability to the exaction depend upon the State or country of origin of the goods.

Reduced to its essentials, the gravamen of appellant's complaint is not that its products are discriminated against because of their origin, as was the case in *Welton* v. *Missouri, supra,* and other cases of that type, but that *appellant, not his goods,* is being discriminated against because *it* is not allowed to peddle them without a license in the way *it* has selected. Virginia affords appellant ample means to have its goods peddled here without the license, *either by itself or by others,* but that is not enough, claims appellant, Virginia must fashion its laws so that appellant can conduct its business here in the manner that is best adapted to its desire, profit and

convenience. No respectable authority can be cited to support such a proposition.

The recent case of *Best and Co.* v. *Maxwell* (decided by this court December 23, 1940, 61 Sup. Ct. Rep. Adv. Op. 334) is relied on in support of the proposition that a State statute may not discriminate against interstate commerce. The soundness of the proposition Virginia has never disputed. The real issue here is whether any such discrimination in fact exists, and upon this question, under the facts and statutes here involved, the *Best* case throws no light. The North Carolina statutes there considered imposed a tax of $250 on every one not a regular retail North Carolina merchant who displayed samples in any hotel room or other temporary quarters for the purpose of securing retail orders. Orders secured by Best and Company were filled by shipping direct to the customers from New York City, and the agent securing the order is what this court has denominated a "drummer". Sales made in this manner have been held by this court to constitute interstate commerce in a long line of cases, of which the leading one is *Robbins* v. *Taxing District of Shelby County,* 120 U. S. 489. On the other hand, this court has uniformly held, as has been pointed out, (*supra,* pp. 5-7) that peddling is not interstate commerce but is a local activity within the regulatory and taxing power of the State.

The North Carolina tax to which Best and Company was subjected for carrying on a pure interstate business (not subject to State regulation as a peddler is) was obviously discriminatory against that business, and, therefore, against interstate commerce which the business

constituted. Whereas Best and Company were charged $250 for the privilege of taking orders by sample in the manner indicated, a State retail merchant was given the same and other privileges and was charged only one dollar. It does not appear that the local merchant in North Carolina was subjected to any tax whatever corresponding to the Virginia merchant's license tax or the capital tax on manufacturers.

The principle stated in the *Best* case has long been well established, and, as above mentioned, is not disputed. Factually, however, that case does not, in the slightest degree, support appellant's contention that its goods are discriminated against by Virginia's system of taxation.

In spite of the fact that the court below apparently did not consider its former decision in *Commonwealth* v. *Myer,* 92 Va. 809, as having any material bearing on the case at bar, appellant persists in relying on it here. Of necessity, the case was either overruled by implication or not considered pertinent to a decision of the questions here involved. The principle established by said *Myer's* case—that Virginia may not discriminate unlawfully against goods manufactured outside the State —was recognized by the Virginia court in the case at bar, and is not disputed by Virginia here. The point is that section 192-b was considered not to discriminate against appellant's goods. Under the statute involved in the *Myer's* case, and quoted in the court's opinion, a wholesale distributor was not exempted from the license with the result that no goods manufactured outside the State could be sold by anyone in Virginia without se-

curing a peddler's license, while a Virginia manufacturer could so peddle his own goods. The court held that this operated as a discrimination against goods made outside the State.

As has been seen, the statute considered in the *Myer's* case was entirely different in terms, purpose and effect from the statute now under review. The case of *Armour and Company* v. *Virginia,* 246 U. S. 1, (which has been discussed above in relation to the question of equal protection), was properly considered by the Court below as more nearly involving the principles controlling the statute here involved with respect to the question of its alleged discriminatory effect upon goods of outside origin. Under the statute there passed on (which is now section 188 of the Tax Code, to which reference has already been made) a manufacturer *"taxed on capital"* by Virginia could sell his goods at his place of manufacture without securing a merchant's license, but a license was required if his goods were sold from a separate store established by the manufacturer. Armour and Company, a manufacturer of another State, challenged the statute on the identical grounds advanced here, namely, that its goods were discriminated against because, not being manufactured in Virginia, they could not be sold from any place of business in Virginia without a license, while the domestic manufacturer could sell his manufactured product from the place of manufacture without a license. The claim of discrimination was denied, this court saying:

> "In the second place, we are also of opinion that the interpretation given by the court below

to the statute excludes all basis for the contention that the provision of the statute imposing the license tax upon the one class and not upon the other gave rise to such discrimination as resulted in a direct burden upon interstate commerce. And this whether the statute be considered from the point of view of the power of the state to enact it inherently considered, or of the power as tested by the necessary operation and effect of the statute, if any, upon interstate commerce and the plenary and exclusive power of Congress to regulate the same.

* * * * *

"But, it is urged, the statute should be held to be a burden on interstate commerce and repugnant to the Constitution because of the disadvantage to which, it is insisted, it necessarily by way of a license tax subjected goods manufactured in another state when sold in Virginia by a merchant manufacturing the same, while no such tax was by the statute imposed on a manufacturer in Virginia selling his goods so manufactured at the place of their manufacture. But we have already tested the statute by its necessary operation and effect and found it not to be repugnant to the commerce clause. Hence this argument but repeats in a different form a contention already disposed of. It follows therefore that if the asserted disadvantage be real and not imaginary, it would be one not direct because not arising from the operation and effect of the statute, but

> indirect as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the Constitution—which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government."

And so with the situation here. Appellant's sole business in Virginia is peddling to retailers. It is, therefore, subject to a license tax which Virginia unquestionably may impose. If other businesses which are otherwise taxed are thus selling to retailers, as an incident of their already taxed businesses without being liable to the peddler's license, this is as the *Armour Case* says:

> "* * * a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the Constitution—which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government."

It is clear, that, in principle, the *Armour Case* is on all fours with the instant case, and that, with the cases therein cited, it is controlling.

Appellant also relies on *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421. The statute there involved, however, differs so fundamentally in its terms and in its

operation and effect from section 192-b of the Tax Code that the case can be of no persuasive authority here. The condition prescribed by the North Carolina statute was obviously discriminatory and, said the court, "cannot be satisfied by a nonresident manufacturer," with the result that "it would prevent competition with the products of the State." In *Stoolsi* v. *Minnesota,* 283 U. S. 57, the statute in the *Bethlehem Motors Case* was described as one making the difference in the amount of the tax, "depending solely on the fact of residence within or without the State", a factor entirely absent here. A resident whose sole business is peddling pays the same tax as a nonresident, and this without regard to the origin of the goods.

Appellant, realizing the damaging effect of the *Armour Case, supra,* upon its claim of discrimination against its goods, and being unable to distinguish it, suggests (R. p. 9) that it has been overruled by the *Bethlehem Motors Case.* But the *Armour Case* was not even mentioned in the opinion in the *Bethlehem Case,* and when the reasoning in the opinions in the two cases is analyzed it is plain that this court considered that the purpose, operation and effect of the two statutes were in no wise similar.

Only two cases were cited in the opinion in the *Armour Case,* but squarely in point here, *New York* v. *Roberts,* 171 U. S. 658, and *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445.

In *New York* v. *Roberts, supra,* the statute attacked taxed every corporation doing business in New York, but excepted corporations wholly engaged in carrying

on manufacture within the State. It should be pointed out here that there is no distinction in section 192-b between domestic and foreign corporations, since a foreign corporation (such as appellant) if taxable on capital for doing business as a distributor or wholesaler, may peddle without the license. The New-York statute was vigorously attacked by a corporation manufacturing its goods without New York, but doing business in that State, on the ground that the statute discriminated against such goods. The cases relied on were for the most part the very cases appellant invokes here. The court, however, denied the contention, and said this:

> "To sustain this contention, the well-known line of cases is cited wherein this court has had to deal with state legislation imposing discriminating taxes against the products of other states (citing cases).
>
> *"If the object of the law in question was to impose a tax upon produce of other states, while exempting similar domestic goods from taxation,* there might be room to contend that such a distinction was constitutionally objectionable, as tending to affect or regulate commerce between the state. But we think that, obviously, such is not the purpose of this legislation. * * *
>
> "It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax; but such

exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state." (Italics supplied.)

The other interesting case, cited in the *Armour Case* opinion, denying the charge of discrimination against products of another State upon the same ground advanced here is *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445.

Summarizing on the question of discriminating against products of another State, it is entirely clear from the opinions of this court that the court has adopted a realistic attitude, considering each statute reviewed according to its purpose, operation and effect. No clear line of demarcation has been drawn, since the presence or absence of discrimination is a question of fact in each case. Throughout the cases, however, there is always one test that has been uniformly applied, namely, whether or not the tax, as was said in *Webber* v. *Virginia,* 103 U. S. 334, is made to depend upon the "foreign character of the articles" or, as expressed in *Welton* v. *Missouri, supra,* "imposed by reason of its foreign origin." A further study of the decided cases will also show that under the statutes struck down by this court it has been impossible for the products of another State to be peddled or sold to anyone without the tax, while the goods of the taxing State *could* be peddled or sold without the license.

Contrast the statute now before the court. The *foreign origin of the goods is not the test and appellant's*

goods may be peddled in Virginia without the license. It has been shown that appellant's goods may be sold to and in turn peddled by a distributor or wholesaler in Virginia without the license—that a great many manufacturers of other States market their products through wholesale distributors in Virginia, the court judicially knows; it has been shown that appellant itself can peddle his goods in Virginia without the license by establishing a distributing point here—the court also judicially knows that this is a common practice; it has been shown that in the case of an ordinary peddler who purchases the goods he peddles the statute makes no distinction between products of Virginia and products of other States. Under these circumstances, it would be fantastic and utterly inaccurate to say section 192-b makes the "foreign character" of the goods the test of the liability to the tax.

We have said, and now emphatically repeat, that, reduced to its essence, appellant's complaint is that Virginia has not so arranged its tax system that appellant may peddle its products here in the way *it* has chosen or as to *it* may economically appear to *its* best interest. Virginia is not required to do this by *any* constitutional provision. Appellant, doing only peddling here, in effect claims that the only way to remove the alleged discrimination against its goods is to allow it to peddle them tax free, because forsooth persons engaged in an entirely different business in Virginia may, as an incident or part of their already taxed business, peddle their goods without further tax. The contention is utterly unsound.

As has been pointed out above, it has been for many

years the policy of Virginia to allow manufacturers taxable on capital and wholesalers paying a license tax on purchasers to peddler their goods to retailers as a natural incident or part of their respective businesses.

Appellant contends that in addition to alleged discrimination against its goods by reason of their source, and aside from any questions of interstate commerce, said goods are also discriminated against by reason of their character, i. e., bakery products. The claim is based upon the exemption from the license accorded peddlers of petroleum and petroleum products, tobacco, sea food, and the grower of the agricultural products he peddles. The reasons for these exemptions from a regulatory standpoint have already been pointed out (*supra*, pp. 11-12), and much that was said there is likewise applicable from a taxation standpoint and need not be repeated.

Appellant approaches this phase of the question under the apparent belief that section 192-b is intended to apply only to peddlers of bakery products. But the statute applies to the peddling of all products manufactured or grown save those exempted.

Appellant appears particularly offended by the exemption the statute affords to peddlers of tobacco and sea food.

As to the exemption afforded peddlers of sea food, the argument is that appellant is a peddler of bakery products (although the statute does not separately classify peddlers of such products), and bakery products and sea food are both foodstuffs, and, therefore, they must be placed in the same class for tax purposes. In other

words, the contention seems to be that *all* foodstuffs must be included in one class.

Appellant overlooks the fact that peddlers or merchants may be classified according to the specific commodity in which they deal, 16 C. J. S. Const. Law, Sec. 530, 1 Cooley on Taxation (4th Ed.) p. 752, 17 R. C. L., p. 511, and that general classes may be subdivided into particular classes and licensed or taxed, *Hammond Packing Co.* v. *State of Montana,* 233 U. S. 331, (oleomargarine taxed, butter exempted); *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, (tax on meat-packing house, but not on merchant selling products of meat-packing house). Appellant might as well argue that all merchandise must be placed in the same class. If anthracite coal may be classified separately from bituminous coal (both fuels), the one being taxed and the other exempt, *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; if a laundry employing more than two women may be licensed and a laundry employing two women exempt from license, *Quong Wing* v. *Kirkendall,* 223 U.S. 59; if a manufacturer of fertilizer from *herring* may be taxed and a manufacturer of fertilizer from other *fish* not taxed, *Alaska Fish Salting & By-Products Co.* v. *Smith,* 255 U. S. 44; if a merchant operating one store may be separately classified from a merchant doing the same thing in two stores, *Indiana* v. *Jackson,* 283 U. S. 527; if a State may separately classify for taxation money on deposit in banks outside the State and money on deposit in banks within the State, *Madden* v. *Kentucky,* 309 U. S. 83 (overruling *Colgate* v. *Harvey,* 296 U. S. 404, relied on by appellant in its brief, p. 12), then it is confidently asserted that two commodities so different

as sea food and bakery products may be separately classified for license tax purposes. See also *Leonard* v. *Maxwell,* 216 N. C. 89, 3 S. E. (2nd) 316, where the validity of the classification of *sea food* for taxation is sustained.

Appellant is unfortunate in its selection of the only case cited in attacking the exemption of peddlers of sea food, *Smith* v. *Cahoon,* 283 U. S. 553. The statute involved in that case was one *regulating motor vehicle carriers.* The purpose of the regulation was to provide "suitable protection for the public against injuries through the operation on its highways of carriers for hire * * *". The statute exempted from its requirements *carriers* of farm products and certain other commodities. The court in effect held that, considering the purpose of the statute, the public needed just as much protection from *motor vehicles using the highways* carrying one commodity as another. The distinction between the statute considered in that case and the one involved in the case at bar is quite obvious. It was recognized by this court in *Hicklin* v. *Coney,* 290 U. S. 169, sustaining a South Carolina statute exempting from the payment of a license fee imposed on contract motor vehicle carriers "farmers or dairymen hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points." *Continental Baking Co.* v. *Woodring,* 286 U. S. 372, sustained a statutory exemption in favor of one "who is carrying his own livestock and farm products to market, or supplies for his own use in his own motor vehicles".

As to the classification of tobacco, except for the fact that it is not a food, what has just been said relative to sea food equally applies. See, also, the case of *Ex parte Asotsky* (Mo.) 5 S. W. (2nd) 22, and an extensive note in 62 A. L. R. 105, where it is said that "the decisions, almost without exception, support the right of the state * * * to put tobacco dealers in a separate class from dealers in other commodities for taxation purposes * * *".

Clearly the appellant has shown no discrimination whatsoever against its goods by reason of their source, and no unlawful or harmful discrimination by reason of their character as bakery products.

CONCLUSION

It is respectfully submitted that the business conducted by appellant in Virginia as a peddler to retailers is a purely local one, and does not constitute interstate commerce but is clearly within the regulatory police power and taxing power of the State; that the challenged statute is a valid and proper exercise of such powers by the State, does not injuriously or unlawfully discriminate against the appellant or its goods, and does not deny equal protection of the laws or burden interstate commerce.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia.

W. W. MARTIN,
Assistant Attorney General.

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SUPREME COURT OF THE UNITED STATES.

No. 676.—October Term, 1940.

Caskey Baking Company, Inc., Appellant, *vs.* Commonwealth of Virginia.	Appeal from the Supreme Court of Appeals of Virginia.

[April 28, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant, a corporation of West Virginia, has its principal office and place of business in Martinsburg in that State. As a foreign corporation registered in Virginia it has paid the latter State an annual registration fee and an income tax on its net profits allocable to its Virginia business. It makes bread which it sells to grocers and other retailers in territory adjacent to Martinsburg, including Winchester and other places in Virginia. Appellant's trucks carry the bread into Virginia where they serve regular routes at regular intervals. The drivers call only on regular customers, inquire of each how much bread he needs and, in response to his order, take it from the truck and deliver it to the customer. Thus each such transaction in Virginia is a sale and delivery in that State to a regular customer.

The company has no property permanently located in Virginia and no place of business in the State, except that, as required by the statute respecting registered foreign corporations, it maintains an office in the State where claims against it may be audited, settled, and paid.

The appellant was convicted for making a sale in Virginia without having procured a license pursuant to § 192 b[1] of the Tax Code of Virginia and a fine was imposed. The Supreme Court of Appeals affirmed the conviction.[2]

[1] Acts of Virginia, 1932, p. 376, 1938, p. 440; Va. Tax Code, 1936, 192 b, Michie, p. 2458, 1940 Supp. 472.

[2] — Va. —, 10 S. E. (2d) 535.

So far as material the statute provides: "There is hereby imposed an annual State license tax on every person, firm and corporation (other than . . . a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller. Provided, however, this act shall not be construed to apply to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants." The annual fee is $100 for each vehicle used in the business.

It is admitted that appellant was not a manufacturer taxable on its capital stock, nor a distributor of manufactured products paying a state license tax on its purchases, nor a licensed wholesale dealer, and did not, therefore, come within any of the classes exempted by the Act.

In the State courts, and here, the appellant challenged the statute as contravening the commerce clause and the equal protection clause of the federal Constitution. Its position is that it is doing either an interstate business which the State may not burden by imposing a license tax, or an intrastate business as to which the exaction works a forbidden discrimination. We hold both contentions untenable.

1. While the transportation of bread across the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the Act hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts.[3] The appellant, however, urges that the Act discriminates against interstate commerce by exempting from its operation the privilege of sales by manufacturers paying tax on their capital employed in manufacture in Virginia. It is said that if its bakery were situate in Virginia the appellant would have the benefit of this exemption and, since it is not, the marketing of appellant's goods shipped into the State is the target

[3] Machine Co. *v.* Gage, 100 U. S. 676; Emert *v.* Missouri, 156 U. S. 296; Wagner *v.* Covington, 251 U. S. 95.

of a hostile discrimination. But the argument overlooks the fact that peddlers resident in Virginia who buy their goods within the State, or buy or procure them from extra-state sources, are alike subject to the Act. The contention that the Act discriminates against interstate commerce by virtue of the exemption in question is negatived by our decisions.[4]

2. Examination of the Tax Code of Virginia discloses that the Act in question is but one portion of a comprehensive scheme of taxation. Manufacturers who sell their own products pay a tax on capital, which the State deems sufficient to cover all their activities, including the vending of the goods.[5] Wholesale merchants who have a fixed place of business pay a license tax measured by a percentage of all their purchases; and if they are also licensed by the town or city in which they have their place of business or, in lieu thereof, are taxed by such town or city on the capital employed in the business, they may sell and deliver at the same time and place anywhere in the State without payment of any additional license tax.[6] Every distributing house, whether operated by a manufacturer or wholesaler for distributing goods amongst the owner's retail stores must be licensed and pay the same tax as if it were a wholesaler.[7] Retail merchants[8] and peddlers at retail[9] must be licensed and pay license taxes,—the former a percentage of the value of his purchases and the latter a fixed annual fee. Those who have no fixed place of business, who peddle their wares only to licensed dealers or retailers at the places of business of the latter, fall into none of the described classes. As the court below points out, were it not for § 192b, such peddlers would be the only vendors in Virginia to escape some form of taxation.

Peddlers at wholesale are not entitled to be licensed and taxed on the same basis as other vendors, as respects either form or amount. As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classi-

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[4] Armour & Co. *v.* Virginia, 246 U. S. 1, and cases therein cited.

[5] Tax Code of Virginia, 1936, §§ 73, 188, Va. Code, 1936, Michie, pp. 2416, 2451.

[6] Tax Code of Virginia, § 188, Va. Code, 1936, Michie, pp. 2451-2452.

[7] *Ibid.*

[8] *Ibid.*

[9] *Id.*, § 192, Va. Code, 1936, Michie, p. 2457.

fying businesses for taxation or impose any iron rule of equality.[10] Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 537, and cases cited.